Supreme Court, U.S.
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90-703

No. _____

In The

# Supreme Court of the United States

October Term, 1990

MARTIN MITCHELL STEVENS,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF OREGON

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46 pp

## QUESTIONS PRESENTED

1. Does a state deny due process to a parent or child if it irrevocably terminates parental rights while denying the parent the ability to be present at the hearing?

2. Is there, under the due process clause of the Fourteenth Amendment, at least a qualified right to be "seen" as well as heard at a hearing affecting fundamental rights?

## LIST OF PARTIES IN PROCEEDINGS SOUGHT TO BE REVIEWED

Petitioner Martin Mitchell Stevens, appellant below.

State of Oregon, *ex rel* Juvenile Department of Lane County, Children's Services Division of the State of Oregon, Virginia Jaye Stevens aka Virginia Jaye O'Brien, William James Stevens, and Ronald Joseph Stevens, respondents below.

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No. _____

In The

# Supreme Court of the United States

October Term, 1990

MARTIN MITCHELL STEVENS,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF OREGON

Petitioner Martin Mitchell Stevens respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Oregon, entered in *State ex rel Juvenile Department of Lane County v. Martin Mitchell Stevens* on July 31, 1990.

## JURISDICTION

The opinion of the Court of Appeals of the State of Oregon was filed on February 14, 1990. A petition for review in the Supreme Court of the State of Oregon was denied on May 22, 1990. Pursuant to Oregon law, the

Appellate Judgment was rendered on July 31, 1990. ORAP, Rule 14.05; *Murray Well-Drilling v. Deisch*, 75 Or. App. 1, 704 P.2d 1159, 1162-63 (n.7) (1985). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## OPINIONS BELOW

The order denying review in the Supreme Court of the State of Oregon has not been reported and is reprinted in Appendix A hereto.

The opinion of the Court of Appeals of the State of Oregon, *en banc*, has not been reported. It is reprinted in Appendix B hereto.

The opinion and judgment of the Circuit Court of the State of Oregon, Juvenile Department, has not been reported. It is reprinted in Appendix C hereto.

The Appellate Judgment has not been reported. It is reprinted in Appendix E hereto.

## CONSTITUTIONAL PROVISION INVOLVED

**United States Constitution**, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On May 10, 1989, Martin Mitchell Stevens' parental rights were "forever terminated," and his two sons, Ronald Joseph and William James, were "permanently committed to the care, custody and control of the state of Oregon," based on evidence presented by the state in a termination hearing. Judgment Terminating Parental Rights and Order of Permanent Commitment, No. 83-469, Appendix C, *infra*. At the time of the hearing petitioner was temporarily confined in a federal prison at Walla Walla, Washington pursuant to a plea of guilty to having manufactured marijuana.

Under Oregon law, Stevens was entitled to be present at the termination hearing. Further, if Stevens had had the money to pay for his expenses (about $3,000), the United States Marshall would have arranged for his transfer to a local jail so that he could be present throughout the proceedings. Stevens, however, was indigent. Therefore, prior to the termination proceeding, his attorney filed a motion in the trial court requesting the state to cause Stevens to be brought to the hearing at the State's expense, or, in the alternative, to postpone the hearing until petitioner's release from prison.[1] Both motions were denied. Order of March 3, 1989, Appendix D.

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[1] Stevens anticipated being released in the Fall of 1989. The postponement, thus, would have been for approximately 6-9 months.

Stevens, therefore, was precluded from attending or participating meaningfully in the hearing, which lasted seven days. Petitioner's only contact with the court was during his own testimony, given over a speaker phone, after the State had presented its evidence. Stevens' attorney was forced to question the State's witnesses without active consultation with, or assistance from, Stevens during the proceedings. Stevens also, obviously, was deprived of the opportunity to persuade the court of his continuing suitability as a parent by virtue of his demeanor and similar forms of non-verbal communication – a form of "evidence" which is particularly significant in a proceeding addressed to such an intensely personal matter as continuing parental fitness.

Petitioner appealed on the ground, *inter alia*, that the State's refusal to arrange for his presence at the hearing violated his right to due process. The Oregon Court of Appeals heard Stevens' appeal on November 27, 1989. It was thereafter resubmitted *en banc* on January 10, 1990. On February 14, 1990 the trial court's decision was affirmed by a closely divided court. CA A60866 (cases consolidated), Appendix B, *infra*. The Oregon Supreme Court denied his petition for review with two justices dissenting. SC S37006, Appendix A, *infra*. The Oregon Court of Appeals thereafter entered judgment from which this writ is sought on July 31, 1990. Appendix E, *infra*.

## REASONS FOR GRANTING THE WRIT

### I.

This petition requests the Supreme Court to consider whether there is at least a qualified due process right to be present at a hearing that may irrevocably affect fundamental rights. Stated otherwise, petitioner asks this Court to determine whether there is (in some circumstances at least) a right to be seen as well as heard.

The issue is presented here in the context of a parental termination hearing in which the State of Oregon refused either to transport petitioner to the hearing from a prison where he was temporarily incarcerated or to continue the hearing until his release. The Court has never addressed this particular issue, although it previously has determined that parents have a constitutionally-grounded, fundamental liberty interest in the care and custody of their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, *reh'g denied*, 453 U.S. 927 (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972). Indeed, the Court has recognized the importance of the parent-child relationship by noting that when a state undertakes any forced deprivation of parental rights, it "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27.

The fundamental presumption in favor of maintaining the family unit implicates the interests of both parent and child, *Santosky*, 455 U.S. at 760-61, thus doubling the stakes in this type of proceeding. Permitting the state, in such circumstances, to prevent petitioner from having the opportunity to participate meaningfully in the termination hearing is particularly unfair because the state has –

by definition – concluded that his rights *should* be terminated. It, thus, cannot claim to serve purely neutral values when it stacks the procedural deck against him. Since the State's role as "plaintiff" is antagonistic to the interests of the parent, the need to carefully safeguard procedural fairness in the interests of both parent and child is manifest.

In a parental termination proceeding, the parent is in every real sense a defendant to a state-initiated action seeking to destroy the vital liberty interests embodied in the parent-child relationship. This Court has held that such a threat to constitutional assurances warrants due process protection surpassing that granted to the ordinary civil defendant. *See, e.g., Santosky*, 455 U.S. at 768-70 (clear and convincing standard of proof required in termination hearings). The Court further has recognized the need for great deference when the government brings such an action purportedly on the child's behalf. *Id.* Oregon's failure to provide for petitioner's presence at a hearing brought to terminate his parental rights confounds this Court's direction to exercise particular care when the State chooses to place those rights in jeopardy.

In criminal cases, a basic guarantee under the Sixth Amendment is the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337, 338, *reh'g denied*, 398 U.S. 915 (1970); *Lewis v. United States*, 146 U.S. 370 (1892). Confrontation subsumes the right of all litigants to effectively cross-examine witnesses against them. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Although parental termination hearings are not, strictly speaking, criminal proceedings,

they nonetheless array the authority of the state against the parent and, as noted, involve a potential deprivation at least as profound as in all but the most serious criminal proceedings. *Santosky*, 455 U.S. at 769 ("the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty") (citation omitted). Yet, in the trial eliminating Stevens' rights, not only was petitioner deprived of the right to have his demeanor assessed, he could not effectively consult with or assist his attorney in meeting the government's evidence. Petitioner's counsel could not obtain contemporaneous information from him and was therefore limited in her ability to engage in effective cross-examination. See pp. 12-13, *infra*.

Petitioner submits that in an action implicating vital liberty interests, the prerogative to be present and to be seen by the tribunal charged with adjudication plus the ability to assist one's counsel at trial stand as a constitutional bottom below which due process guarantees are unlikely to be satisfied.

## II.

The "right to be seen" for which petitioner argues in this case flows from the confluence of two separate liberty interests: *first*, the interest of parents and their children in maintaining their familial relationship and, *second*, the general due process interest in procedural fairness. Each of those interests standing alone raises due process concerns sufficiently serious to merit review by this Court. Together we submit that the case for review is commanding.

This Court previously has recognized that parents have an important and protected liberty interest in the care, custody and management of their children. *Santosky*, 455 U.S. at 753; *Lassiter*, 452 U.S. at 27. While those rights, of course, may be forfeited through neglect or misconduct, such an interference by the state is not lightly permitted since it demonstratably "work[s] a unique kind of deprivation" (*Lassiter*, 452 U.S. at 27) both to the parent and to the child. Thus, this Court has held not only that parental termination proceedings "must be accomplished by procedures meeting the requisites of . . . Due Process" (*Santosky*, 455 U.S. at 753), but has given content to that determination by recognizing a qualified right to counsel (*Lassiter*) and by requiring proof of parental unfitness by "clear and convincing evidence" (*Santosky*, 455 U.S. at 756).[2]

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[2] The Court also has held that the proper framework for analyzing due process claims in parental termination cases is the three part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under *Mathews*, courts must balance three distinct factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky*, 455 U.S. at 754. *Santosky* already has established that "[i]n parental rights termination proceedings the private interest affected is commanding" (*Id.* at 758) and that "[g]iven the weight of the private interests at stake, the social cost of even occasional error is sizable." (*Id.* at 764).

As for the remaining factor, petitioner submits that the counterveiling state interest here is slight. We take it as beyond dispute that a state would violate due process if it prohibited parents, as a general matter, from attending parental termination hearings. Further, if petitioner in this case had been able to

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There is, in addition, an independent interest in assuring a right of personal presence and participation in judicial proceedings as an important aspect of our adversarial judicial system. That right is implicated without regard to the nature of the specific proceeding, although its strength may depend upon the context in which it is sought to be invoked. Thus, in criminal cases the right flows specifically from the confrontation clause of the Sixth Amendment, and is all but absolute. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988); *Maryland v. Craig*, ___ U.S. ___, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).[3]

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afford to pay his own expenses, the state would have brought him to the hearing. Thus, this is not a case, such as *Wolff v. McDonnell*, 418 U.S. 539 (1974), in which the state asserts counterveiling penological concerns as a basis for restricting a prisoner's due process rights. *See* 418 U.S. at 556. (Recognizing that in prisoner rights cases there must be "a mutual accommodation between institutional needs and [the Constitution]"). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). Rather, the only state interest asserted is the $3,000 it would have cost to let petitioner preserve his right to appear at a hearing in which his rights ever again to be a father to his children (and his children's rights to continue their legal and psychological ties to their father) were at stake. That balance would scarcely seem to tip in the state's favor. *See, e.g., Little v. Streater*, 452 U.S. 1 (1981). (State's interest in avoiding cost of blood grouping test for indigent defendant in paternity suit insufficient in light of important interests at stake).

[3] "Although the face-to-face confrontation requirement of the clause is not absolute, that does not mean that the requirement may easily be dispensed with . . . [A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where (1) denial of such confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 111 L. Ed. 2d at 670.

Apart from the specific right of confrontation, courts repeatedly have acknowledged the importance of demeanor in arriving at informed and correct decisions. That concept finds repeated expression in civil as well as criminal actions. For example, Rule 52 of the Federal Rules of Civil Procedure provides that findings of fact may not be set aside unless "clearly erroneous" after giving "due regard" to the trial court's opportunity "to judge the credibility of the witnesses." In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court elaborated on the importance of this point as follows:

> When findings are based on determinations regarding the credibility of witnesses [as opposed to documentary evidence], Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

470 U.S. at 575.

The ability of a trier of fact to judge the moral "worth" of a person and to predict his or her future conduct demands an intuitive evaluation that cannot adequately be based on mere words.[4] For example, in the

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[4] That is particularly true in the awkward circumstances of this type of case. The Court has noted that parents involved in termination proceedings "are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation" (*Lassiter*, 452 U.S. at 30). Requiring petitioner to testify by speaker phone exacerbates the problems such a parent might have testifying and defending in such an

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similarly intuitive context of criminal sentencing this Court has noted that the trial judge must base sentencing decisions in part on subjective predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation. *United States v. Grayson*, 438 U.S. 41, 48 (1978). To that end, the defendant's demeanor and behavior in court are likely to be important indicators of the defendant's rehabilitative potential:

> . . . we have acknowledged that a sentencing authority may legitimately consider the evidence heard during trial, as well as the demeanor of the accused. . . . More to the point presented in this case, one serious study has concluded that the trial judge's "opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition."

438 U.S. at 50 (citations omitted). The recognition that personal observation is important is scarcely new. More than a century ago this Court stressed the importance of observing demeanor in being able to pick a fair-minded jury: "[T]he manner of the juror while testifying is often times more indicative of the real character of his opinion than his words." *Wainwright v. Witt*, 469 U.S. 412, 420 (1985) (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57 (1878)).[5]

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action. This further decreases the value of the inherently inferior process granted to petitioner here. While speaker phones may be commonplace to the average judge and lawyer, they are utterly alien to people such as petitioner.

[5] In *California v. Green*, 399 U.S. 149 (1970), *cert. dismissed*, 404 U.S. 801 (1971), this Court held that the Confrontation

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What is more, the ability of a party to be present throughout a trial to assist his or her counsel in examining and cross-examining witnesses also is self-evidently important.[6] *See Geders v. United States*, 425 U.S. 80 (1976) (recognizing Constitutional right of criminal defendant to access to counsel throughout trial proceedings, including evening recess). Indeed, the very concept of "*assistance* of counsel" implies active involvement by the party being "assisted." Furthermore, recognition that such assistance must be "effective" or "meaningful" means not only that counsel must possess and utilize the requisite professional skills, but that the conditions necessary to utilizing those skills effectively must be maintained. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (state must provide an indigent defendant with psychiatric assistance to enable counsel to present an insanity defense: a defendant must be given "[m]eaningful access to justice." 470 U.S. at 77); *see also Little v. Streater*, 452 U.S. 1 (under due process clause state must provide indigent defendant with funds

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Clause was not violated by admitting a declarant's out-of-court statements *as long as the declarant testified as a witness at trial and was subject to full cross-examination*. The Court discounted "as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus *giving the jury a chance to observe and evaluate his demeanor* as he either disavows or qualifies his earlier statement." *Id.* at 160 (emphasis added).

[6] That is particularly true because of the absence of broad civil-type discovery in parental termination hearings.

to conduct sophisticated blood grouping test necessary to disprove parenthood).

Determining the extent of a party-defendant's right to be present in proceedings affecting fundamental liberty interests is, therefore, a matter which justly commands the attention of this Court. Several lower courts have held that a prisoner has no constitutional right to demand to be brought to court to testify as a plaintiff in a civil damage action under 42 U.S.C. § 1983. *See, e.g., Jones v. Hamelman*, 869 F.2d 1023, 1029-30 (7th Cir. 1985); *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1985); *but compare Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982). We submit that those holdings, themselves, invite scrutiny by this Court because of the importance of demeanor evidence and the need to be present to assure effective assistance of counsel. See discussion, *supra*. Yet, even conceding the correctness of those cases, they underscore – rather than undermine – the appropriateness of review here. There is a world of difference between being a plaintiff seeking civil damage redress from government officials, on the one hand, and having the authority of the state invoked *against* an individual in a state-sponsored effort to irrevocably terminate an interest as fundamental as parental rights. This Court ought, at a minimum, to hear this case to consider that distinction and, if appropriate, make it explicit.[7]

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[7] The distinction is all the more critical in light of the fact that, as this Court has correctly observed, parental termination proceedings also plainly implicate the interests of the child (a point entirely overlooked in the decisions below). *See, e.g.,*

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It is important to stress that the right petitioner claims is a limited one.[8] Petitioner does not argue that all indigent parents must be provided the cost of attending termination hearings. If a non-incarcerated parent wishes to maintain custody and control of his or her child it is likely that parent and child will be living in the same household or at least in close physical proximity to each other and to the place of the hearing. Thus, the issue of travel expenses will not arise. Even where that is not the case, so long as a parent is free, he or she can do whatever is needed (walk, hitchhike, etc.) to get to the hearing. It is, thus, the particular combination of indigence plus incarceration that creates the necessity of affirmative state

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*Santosky*, 455 U.S. at 760 (both "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"). In fact, in both legal and psychological respects, "[f]or a child, the consequences of termination . . . may well be far reaching" (*id.* at 760 n.11), extending from the simple fact of disruption of the parent-child bond to the loss of rights of succession. Hence, the child's due process interest in "preventing erroneous termination" (*id.* at 760) argues independently for a right to see and be seen. In fact, if the parent's demeanor turns the tide and avoids wrongly severing the critical parental bond, everyone's interests will have been served – even the state's. (*See Lassiter*, 452 U.S. at 27: "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision"; *Santosky*, 455 U.S. at 766-67: "*Parens patriae* interest favors preservation, not severance of natural familial bonds.") In fact, unlike a parent's right to counsel or imposing a heightened burden of proof on the state, assuring a parent the right to be present at a termination hearing furthers no interest other than the search for an "accurate and just decision."

[8] While the scope of the right may be limited, the need for its recognition plainly is not. A recent study of the incidence of

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intervention to keep this important due process interest from being lost.

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criminal conduct in the adult urban male population in California determined that 25 percent of the overall male population and 51 percent of the black male population had at least one arrest for a serious felony. Tillman, *The Prevalence and Incidence of Arrests Among Adult Males in California* (Bureau of Criminal Statistics Forum, 1988).

While the incidence of criminality is high, there is no inherent connection between the fact of unlawful conduct and parental fitness. *See generally* J. Fassler, "When a Parent Goes to Prison," *Helping Children Cope* (N.Y. Free Press 1978); A. Stanton, *When Mothers Go to Jail* (Lexington Books 1980); C. Hairston & P. Lockett, "Parents in Prison: New Directions for Social Service," 32:2 *Social Work* (Mar./Apr. 1987). Nonetheless, it would belie common sense to suggest that no negative inference arises from a criminal record, let alone contemporary incarceration. That fact increases the need for a parent to marshall all available resources to rebut the negative implications arising from past misconduct. The persuasive power of a favorable personal appearance is, without doubt, among the most important of those resources.

## CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeals of the State of Oregon.

Dated: October 26, 1990

Respectfully submitted,

STEPHEN V. BOMSE*
CHARLES N. FREIBERG
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HELLER, EHRMAN, WHITE
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*Attorneys for Petitioner*

*Counsel of Record

## APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON

| | | |
|---|---|---|
| In the Matter of<br>STEVENS, WILLIAM JAMES<br>STEVENS, RONALD JOSEPH<br>STEVENS-JOHNSTON, JAMIE IAN | ) | ORDER<br>DENYING<br>REVIEW |
| State of Oregon, Exrel<br>JUVENILE DEPT OF LANE COUNTY<br>CHILDREN'S SERVICES DIV<br>STEVENS, WILLIAM JAMES<br>Respondents<br>STEVENS, MARTIN MITCHELL | ) | CA A60866<br>SC S37006 |
| STEVENS, VIRGINIA JAYE<br>Aka O'BRIEN, VIRGINIA JAYE<br>STEVENS, RONALD JOSEPH<br>STEVENS-JOHNSTON, JAMIE IAN<br>JOHNSTON, SANDY JOHN<br>Respondents | ) | |
| v. | ) | |
| STEVENS, VIRGINIA JAYE<br>Aka O'BRIEN, VIRGINIA JAYE<br>Respondent<br>STEVENS, MARTIN MITCHELL<br>Petitioner<br>JOHNSTON, SANDY JOHN | ) | |

The Court has considered the petition for review and ORDERS that it be denied.

DATE: MAY 22, 1990.

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

Fadeley and Unis, JJ would allow

copies to:

| | | |
|---|---|---|
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| SUSAN ANN SCHMERER | Attorney for: | Respondent |
| DIANE MARY DEPAOLIS | Attorney for: | Petitioner |
| KATHERINE M. BLASER | | |

**APPENDIX B**

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, WILLIAM JAMES STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Appellant.

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In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Respondents,

v.

MARTIN MITCHELL STEVENS,

Appellant.

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In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, RONALD JOSEPH STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, Appellant.

---

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien, Respondents,

v.

MARTIN MITCHELL STEVENS, Appellant.

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In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and SANDY JOHN JOHNSTON, Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, Appellant.

---

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and VIRGINIA JAYE STEVENS, aka

Virginia O'Brien, Respondents,

v.

SANDY JOHN JOHNSTON, Appellant.

---

(86-655; 83-469; 88-113)
(CA A60866 (control); CA A60893; CA A60894)
(Cases consolidated)

In banc

Appeal from Circuit Court, Lane County.

William A. Beckett, Judge.

Argued and submitted November 27, 1989; resubmitted in banc January 10, 1990.

Susan A. Schmerer, Eugene, argued the cause and filed the brief for appellant Virginia Jaye Stevens.

Diane M. DePaolis, Eugene, argued the cause for appellant Martin Mitchell Stevens. With her on the brief was DePaolis, Evans, Shepard & Vallerand, Eugene.

Katherine M. Blaser, Eugene, argued the cause and filed the brief for appellant Sandy John Johnston.

Michael C. Livingston, Assistant Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for other respondents.

GRABER, J.

Affirmed.

Newman, J., dissenting.

FILED: February 14, 1990.

GRABER, J.

Three parents appeal the trial court's judgment terminating their rights to three children. All of the children have the same mother. We affirm without further discussion on all issues involving the mother and the father of the youngest child. We write only to discuss constitutional arguments that Martin Stevens, the father of the two older children, raises. We affirm the termination of his rights.

At the time of trial, Stevens was in prison in Washington on a federal conviction. Because he was indigent, the court appointed an attorney to represent him in this proceeding. However, it refused to order the state to pay the $2,500 to $3,700 that it would cost to bring him to Eugene and hold him in the Lane County Jail for the duration of the trial. Instead, Stevens testified by telephone. He argues that the court's refusal to pay for his appearance in person violated several state and federal constitutional provisions.

Stevens first asserts that he had a right, under Article I, section 11, of the Oregon Constitution, to receive effective assistance of counsel and to confront the witnesses face to face. He could exercise those rights, he argues, only if he were present. The problem with that argument is that Article I, section 11, applies "[i]n all criminal prosecutions"; a proceeding to terminate parental rights is not a criminal prosecution. It is true, as the Supreme Court has noted, that such a proceeding is "one of the

most drastic actions that state can take against its inhabitants" and that the consequences of denial of counsel "are as serious as they are in most criminal prosecutions." *State v. Jamison*, 251 Or 114, 117-18, 444 P2d 15, 444 P2d 1005 (1968). The importance of a termination proceeding does not, however, make it a criminal prosecution. Article I, section 11, does not grant rights that apply in termination cases.[1]

Next, Stevens claims that the court's action denied him due process of law under the Fourteenth Amendment. To the degree that he bases his claim on the rights that the Due Process Clause incorporates from the Fifth and Sixth Amendments, his argument has the same infirmity as does his claim under Article I, section 11. Those rights apply only in criminal prosecutions. It may be that similar rights are available in termination cases, but, if so, the reason is that fundamental fairness requires them in a particular case or category of cases. In *Lassiter v. Department of Social Services*, 452 US 18, 24-27, 101 S Ct 2153, 68 L Ed 2d 640 (1981), the Supreme Court recognized that a termination case threatens the parent with "a unique kind of deprivation" and that, as a result, the parent has a commanding interest in the justice and accuracy of the decision. The Court held, nevertheless, that fundamental fairness does not require the appointment of counsel for a parent in all termination cases.

In order to determine what due process requires before the government may deprive a person of an important right, the Supreme Court directs us to balance the interests that it identified in *Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976):

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and *the probable value, if any, of additional or substitute procedural safeguards*; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Emphasis supplied).

*See Lassiter v. Department of Social Services, supra,* 452 US at 27. In *Babcock v. Employment Division,* 72 Or App 486, 491, 696 P2d 19 (1985), we applied the criteria of *Mathews* in considering whether a telephone hearing in an unemployment compensation case violated due process. We concluded that it did not. We reasoned that the claimant had an opportunity to cross-examine witnesses, personal appearances would not materially reduce the risk of erroneous decisions, and the Employment Division had a strong interest in telephone hearings as a fair and efficient way to conserve its limited resources.

We reach a similar conclusion in this case. Stevens' interest in his parental rights is undoubtedly great. For that reason, he received significant procedural protections. The state was required to prove the facts supporting its petition by clear and convincing evidence, ORS 419.525(3), at a trial at which Stevens was represented by appointed counsel. Our review of the decision against him is *de novo*. ORS 419.561(4). Stevens testified by telephone[2] and was able to consult with his counsel in the same way. His testimony followed that of the adverse witnesses and responded to it point by point, and his counsel was able to cross-examine the adverse witnesses

meaningfully. Those facts suggest that he was able *effectively* to consult with counsel. Indeed, he does not claim that any specific portion of the trial was affected by his absence or that his inability to consult with counsel in person hampered any specific portion of trial preparation or strategy. In view of the extensive safeguards that Stevens did enjoy, we cannot say that the probable value of his physical presence in assuring an accurate and just decision was great. On the other hand, the only interest that the state asserts is financial. In contrast to *Babcock v. Employment division, supra,* the record does not show that that interest extends beyond this particular case, to an extensive governmental program.

We must balance what would be at best a marginal improvement in the fact finding process against a somewhat less marginal governmental interest. In *In Re Darrow,* 32 Wash App 803, 649 P2d 858 (1982), the Washington Court of Appeals held that it was not a violation of due process for the state to refuse to pay to transport a prisoner from Arizona to Washington for a termination hearing. In that case the prisoner was represented by counsel but did not testify, by telephone or otherwise. We need not decide whether we would agree with the Washington court on identical facts. We do hold, however, that on the facts of this case the trial court did not deny Stevens due process when it refused to require the state to pay for his transfer to Eugene in order to participate in the trial.[3]

The dissent's approach has two flaws. First, it assumes, as a matter of fact, that the trial court's inability to evaluate Stevens' demeanor in person was important here, because "[a] key witness adverse to father was the

child's mother, who did appear in person." ___ Or App ___. (Slip opinion at 2.) Testimony from witnesses, other than mother, during the lengthy trial bore on Stevens' fitness. Most significantly, Stevens admitted many of the key facts about which mother testified, including his participation in the manufacture of methamphetamines, his past abuse of drugs and alcohol, and his long criminal history; most recently, he had pled guilty to a federal charge of manufacturing marijuana. He admitted that the people with whom he was associating before his incarceration were dangerous to him and his family. Moreover, the trial court clearly viewed mother's testimony with caution, as shown by its termination of her parental rights. Even if we, on *de novo* review, accepted Stevens' version where it conflicted with mother's, we would still affirm the trial court's decision. On this record, it is not likely that his absence was in fact critical.

Second, the dissent blurs the distinction between two different considerations: "the private interest that will be affected" by the hearing and "the probable value, if any, of additional * * * safeguards" in the procedure. *Mathews v. Eldridge, supra,* 424 US at 335. The importance of Stevens' interest does not *necessarily* translate into added value for the requested additional procedure. The dissent's emphasis on his interest as the controlling factor causes it to overlook the narrowness of our inquiry. We must decide whether Stevens was afforded a full and fair opportunity to present evidence in his behalf and to rebut evidence offered against him and must decide only whether the *incremental* safeguard of personal appearance is not merely desirable, but constitutionally required. In this case, Stevens received that full and fair opportunity,

and the denial of his request to be brought to the hearing at the state's expense did not deny him due process.

Affirmed.

FOOTNOTES

[1] Stevens also cites Article I, section 10, as a source of the rights that he seeks. He does not explain how the failure to bring him to Eugene denied him a remedy in the due course of law for an injury done to him. *See, e.g., Hale v. Port of Portland*, 308 Or 508, 517-24, 783 P2d 506 (1989). Neither Article I, section 10, nor any other provision of the Oregon Constitution is analogous to the Due Process Clause of the Fourteenth Amendment. *State v. Clark*, 291 Or 231, 235 n 4, 630 P2d 810 (1981).

[2] In *State ex rel Juv. Dept. v. Gates*, 86 Or 631, 740 P2d 217 (1987), *rev den* 305 Or 45 (1988), we held, in a termination case, that taking the testimony of expert witnesses by telephone over the objection of a party violated ORS 45.010 and ORS 45.040. Stevens does not make a statutory challenge to taking his testimony by telephone.

[3] We affirm on the merits of Stevens' appeal.

NEWMAN, J., dissenting.

The majority errs when it holds that due process under the Fourteenth Amendment does not require the state to pay $2,500 to $3,700 to bring father from the Washington State Penitentiary to the Lane County Jail to defend his parental rights in person. The majority quotes the *Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976), three-part balancing test, ___ Or App at ___ (slip opinion at 3), but misapplies it and reaches a wrong, and fundamentally unfair, result.

As to the privacy interest at stake, father has a fundamental liberty interest as a parent. *Stanley v. Illinois*, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551 (1972). The majority opinion correctly acknowledges that "[father's] interest in his parental rights is undoubtedly great." ___ Or App at ___. (Slip opinion at 3-4). That fundamental liberty interest was *not* present in *Babock v. Employment Division*, 72 Or App 486, 696 P2d 19 (1985), an unemployment compensation case to which the majority gives so much weight. ___ Or App at ___. (Slip opinion at 3.)

As to the risk of erroneous deprivation of father's parental interest, the majority asserts that "we cannot say that the probable value of [father's] physical presence in assuring an accurate and just decision was great[,]" ___ Or App at ___ (slip opinion at 4), and calls father's presence "at best a marginal improvement in the factfinding process." ___ Or App at ___. (Slip opinion at 4-5.) The

majority's conclusions are wrong. The purpose of a termination proceeding is to determine a person's fitness to continue as a parent. This is one of the most difficult tasks that a court can undertake. As stated by the court, in *State v. Jamison*, 251 Or 114, 117, 444 P2d 1005 (1968):

> "The permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants."

To minimize the risk of error, the court must be able to determine as accurately as possible what kind of person the parent is. Demeanor has an importance that it does not have in other kinds of proceedings, such as an unemployment compensation hearing.

Because the state did not provide the expenses for father to appear, the court could not evaluate his demeanor. A key witness adverse to father was the child's mother, who did appear in person. Although father admitted certain "key facts about which mother testified," ___ Or App at ___ (slip opinion at 5), he also contradicted her testimony on other "key facts," including her allegations of physical abuse and various criminal charges. Mother's parental rights were also at issue, but that only heightens the need for the court to be able to weigh father's credibility against hers. The majority, therefore, seriously underestimates the probable value of father's presence in court.

The majority asserts that father failed to point to a "specific portion of the trial [that] was affected by his absence[.]" ___ Or App at ___. (Slip opinion at 4.) He does not need to, because his absence affected the entire proceeding. The majority fails to evaluate correctly the

importance to the trial court of observing father when determining his credibility and parental fitness, as well as the importance to father of an opportunity to be at his counsel's side and to face witnesses when they give adverse testimony.

As to the governmental interest, the majority concedes that the state's $2,500 to $3,700 interest is only "financial." ___ Or App at ___. (Slip opinion at 4.) Its interest is weak. Again, this is not an unemployment compensation hearing where, according to the majority, the state has a "strong interest in telephone hearings as a fair and efficient way to conserve its limited resources." ___ Or App at ___. (Slip opinion at 3.)

After identifying and characterizing the three factors that it must balance under *Mathews v. Eldridge, supra*, the majority then strikes an unfair balance. Despite its efforts at the end of the opinion to explain what it has done, ___ Or App at ___ (slip opinion at 6), in actuality it has failed to place on the scale the great weight of father's fundamental interest in his parental rights. Contrary to *Mathews*, the majority weighs *two* factors only – *not three*. As it earlier stated:

> "We must balance what would be at best a marginal improvement in the factfinding process against a somewhat less marginal governmental interest." ___ Or App at ___. (Slip opinion at 4-5.)

I have already emphasized that the majority errs when it evaluates father's presence as only a "marginal improvement in the factfinding process." ___ Or App at ___. (Slip opinion at 4-5.) It is at least of equal importance that the majority has not placed in the balance at all father's

parental interest. If the majority had given that interest proper weight, it could not have reached the result that it did in view of the weak interest of the state.

I dissent.

Joseph, C.J., and Buttler and Rossman, JJ, join in this dissent.

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 1990, I served two true copies of the foregoing Petition for Review of Martin Mitchell Stevens on each of the persons, parties, entities or agencies listed below, by depositing in the United States Post Office at Eugene, Oregon, with postage prepaid thereon, enclosed in a sealed envelope containing the copies addressed, respectively, as follows:

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## APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

JUVENILE DEPARTMENT

| | | |
|---|---|---|
| In the Matter of<br><br>RONALD JOSEPH STEVENS,<br><br>A Child. | ) | Case No. 83-469<br>JUDGMENT TERMINATING PARENTAL RIGHTS AND ORDER OF PERMANENT COMMITMENT |

This matter came on for trial on March 14, 1989, before the Honorable William A. Beckett, Circuit Judge; Petitioner Children's Services Division appeared through Cynthia Guiles-Fellez, caseworker, and Stephen R. Blixseth, Assistant Attorney General; Martin Mitchell Stevens appeared through his attorney, Diane DePaolis; Sandy John Johnston appeared in person and through his attorney, Katherine M. Blaser; Virginia Jaye Stevens, aka Virginia Jaye O'Brien, appeared in person and through her attorney, Susan Schmerer; the child appeared through his attorney, William A. Furtick. Trial continued on March 15, 16, 20, 21, 22, 23 and on March 24, the parties rested and made argument. Thereafter, the court rendered its decision from the bench.

The court finds by clear and convincing evidence that it has jurisdiction over the minor child, the subject matter of the action, and the parties. The court further finds that the following allegations of the petition to terminate the parental rights of Martin Mitchell Stevens have been proven by clear and convincing evidence: 1, 2 (except as to father's address), 3, 4a, 4b (except as to controlled

substances), 4d and 4e. Paragraphs 4c and 5b were withdrawn by petitioner at the conclusion of its case. Paragraph 4b as to controlled substances and Paragraphs 5c and 5d were stricken upon father's motion at the conclusion of petitioner's case. 5a was not proven.

The court treats all termination of parental rights cases as among the most serious matters before the court. The court finds, by clear and convincing evidence, if not beyond a reasonable doubt, that Martin Mitchell Stevens is not a fit parent, not solely by reason of his incarceration (he has been unavailable to the children by reason of incarcerations since mid 1986), but because of his whole style of life. The court finds that Mr. Stevens has used illegal substances, associates with criminal elements, and that drugs and drug paraphernalia have been on the premises where the children lived with him. His criminal convictions are the direct result of his lifestyle.

The court believes that Mr. Stevens has been violent towards Virginia Jaye Stevens, aka O'Brien, the mother of the child, and that this violence was committed in front of the children.

Mr. Stevens testified by telephone, pursuant to the agreement of counsel, and his testimony demonstrates that he is still in denial, and that services would be of little avail.

Based on the above, the court concludes that it is in the best interests of the child that Mr. Stevens' parental rights be terminated and the child freed for adoption;

NOW, THEREFORE, IT IS HEREBY ADJUDGED that the parental rights of Martin Mitchell Stevens to the

above-named child shall be, and hereby are, forever terminated, and the child is permanently committed to the care, custody and control of the state of Oregon, Department of Human Resources, Children's Services Division, with authority to consent *in loco parentis* to the adoption of said child, in lieu of the consent of the child's father, whose rights are hereby judicially terminated.

DATED this 10th day of May, 1989.

/s/ William A. Beckett
William A. Beckett
Circuit Judge

APPROVED AS TO FORM:

/s/ Stephen R. Blixseth
Stephen R. Blixseth,
OSB No. 71023
Assistant Attorney General Of Attorneys for Petitioner

/s/ Diane M. DePaolis
Diane M. DePaolis,
OSB No. 76119
Attorney for Father

/s/ William A. Furtick
William A. Furtick,
OSB No. 75125
Attorney for Child

SUBMITTED BY:
Stephen R. Blixseth, OSB No. 71023
Assistant Attorney General
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 1989, I served two true copies of the foregoing Appellant's Opening Brief and Abstract of Record on each of the persons, parties, entities or agencies listed below, by depositing in the

United States Post Office at Eugene, Oregon, with postage prepaid thereon, enclosed in a sealed envelope containing the copies addressed, respectively, as follows:

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**APPENDIX D**

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF LANE
Juvenile Department

| | | |
|---|---|---|
| In the Matter of | ) | Case No. 83 469 |
| RONALD JOSEPH STEVENS, | ) | Case No. 86 655 |
| WILLIAM JAMES STEVENS, | ) | |
| Children. | ) | |

THIS MATTER having come before the Court on Father's Motion for Approval of Expenses, and Alternative Motion to Sever and Postpone Trial and the court having taken said Motions on the record and now being fully advised,

IT IS HEREBY CONSIDERED AND ORDERED that both Motions are denied.

DATED this 3rd day of March, 1989.

/s/ James R. Hargreaves
JAMES R. HARGREAVES
CIRCUIT JUDGE

## APPENDIX E

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, WILLIAM JAMES STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Appellant.

---

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Respondents,

v.

MARTIN MITCHELL STEVENS,

Appellant.

---

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, RONALD JOSEPH STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

APPELLATE JUDGMENT

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, — Appellant.

---

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien, — Respondents,

v.

MARTIN MITCHELL STEVENS, — Appellant.

---

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and SANDY JOHN JOHNSTON, — Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, — Appellant.

---

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Respondents,

v.

SANDY JOHN JOHNSTON,

Appellant.

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(86-655; 83-469; 88-113)
(CA A60866 (control); CA A60893; CA A60894)
(Cases consolidated)

In banc

Appeal from Circuit Court, Lane County.

William A. Beckett, Judge.

Argued and submitted November 27, 1989; resubmitted in banc January 10, 1990.

Susan A. Schmerer, Eugene, argued the cause and filed the brief for appellant Virginia Jaye Stevens.

Diana M. DePaolis, Eugene, argued the cause for appellant Martin Mitchell Stevens. With her on the brief was DePaolis, Evans, Shepard & Vallerand, Eugene.

Katherine M. Blaser, Eugene, argued the cause and filed the brief for appellant Sandy John Johnston.

Michael C. Livingston, Assistant Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for other respondents.

GRABER, J.

Affirmed.

Newman, J., dissenting.

FILED: February 14, 1990.

DESIGNATION OF PREVAILING PARTY AND ALLOWANCE OF COSTS

Case Name: *State ex rel Juvenile Department v. Stevens*

Appellate case number: A60866 (control); 60893 and 60894

Trial Court or agency case number: 86-655; 83-469 and 88-113 (C)

Prevailing party or parties: Respondents in all cases.

[ ] No costs allowed

[ ] Costs allowed to the prevailing party or parties, payable by:

In a criminal, post-conviction relief, habeas corpus, juvenile or other case in which a party may be represented by appointed counsel entitled to compensation under ORS 138.500, if the prevailing party is a private party and represented by retained counsel or appeared *pro se*, the prevailing party is allowed costs.

* * *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $ _____, and attorney fees in the amount of $ _____. (ORAP 11.03, 11.05, and 11.10.)

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $ _____, for filing fees not waived and unpaid at the time of entry of the final written disposition of this ___ case. ORS 21.605. ___

Date Supreme Court denied review: MAY 22 1990

DATED: JUL 31 1990 COURT OF APPEALS

(seal)

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). *See also* ORS 19.190(1).

Supreme Court, U.S.
FILED
FEB 1 1991
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 90-703

# In the Supreme Court of the United States

OCTOBER TERM, 1990

MARTIN MITCHELL STEVENS

Petitioner,

v.

STATE OF OREGON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Does a state court's decision not to provide an indigent father, incarcerated in another state, with funds to attend a parental rights termination hearing violate due process when the father's participation by telephone neither limits his counsel's ability to represent him nor affects the ruling terminating his parental rights?

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## BRIEF OF RESPONDENT IN OPPOSITION

Respondent State of Oregon accepts petitioner's statement of the opinions below,[1] his statement of the constitutional provision involved, and his statement of jurisdiction as adequate for review.

## STATEMENT OF THE CASE

The state supplements Stevens' Statement of the Case as follows: On August 9, 1988, the State of Oregon filed petitions in the trial court seeking termination of Stevens' parental rights with respect to his two minor sons. (Petitions for the Termination of Parental Rights). On the same day, the state filed petitions to terminate the parental rights of the children's mother, Virginia Stevens.[2] The petitions were filed pursuant to *former* Or. Rev. Stat. § 419.523.[3] On August 24, 1988, Stevens, through his trial counsel, filed written responses denying the material allegations of the petitions. (Responses of Father). By stipulated order filed November 17, 1988, and signed by Stevens' trial counsel, the parties agreed that trial in the case should be set for March 14, 1989. (Stipulated Order Setting Trial).

On February 24, 1989, approximately three weeks before the scheduled trial, Stevens filed a motion seeking the trial court's approval for payment of the following expenses:

> [P]ayment by the State of Oregon directly to the various service providers required of the expenses of trans-

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[1] Both the order of the Oregon Supreme Court denying review and the opinion of the Oregon Court of Appeals are reported. *See State ex rel. Juv. Dept. v. Stevens*, 100 Or. App. 481, 786 P.2d 1296, *rev. denied*, 310 Or. 71 (1990).

[2] The state also filed petitions to terminate the parental rights of Ms. Stevens and Sandy Johnston with respect to their child.

[3] *Former* Or. Rev. Stat. § 419.523 is reprinted as Appendix A attached hereto.

> porting him from the Washington State Penitentiary in Walla Walla, Washington to the Lane County Jail, Eugene, Oregon, and housing him in said jail, and maintaining his presence in the Lane County Circuit Courthouse for the purpose of attending the trial herein, said expenses being presently estimated at no more than $3,685.00.

(Motion for Approval of Expenses, and Alternative Motion to Sever and Postpone Trial). In the alternative, Stevens requested that "trial of his portion of this case" be severed "from that of the other parties and postpon[ed]" until "a reasonable time following [his] release from incarceration." *Id.* In a supporting affidavit, Stevens' trial counsel stated, *inter alia*, that (1) "the only way to transport a federal prisoner from the state penitentiary in Washington to be housed in the Lane County Jail, so he could attend his trial, is to petition for a Writ of Habeas Corpus *ad Testificandum*"; (2) Stevens is indigent and cannot pay the expenses of transportation and security if released from Washington to attend trial in Oregon; and (3) if the court allowed the motion for payment of expenses, she would "immediately prepare and file a Petition for a Writ of Habeas Corpus and other necessary documents." (Affidavit of Father's Counsel).

The state took no position on Stevens' motion for payment of expenses, but it opposed his alternative motion to sever and postpone trial. (Memorandum in Response to Motions). On March 3, 1989, the trial court denied both motions. (Order).[4] Trial on the petitions to terminate the parental rights of Stevens, Sandy Johnston, and Virginia Stevens began, as scheduled, on March 14, 1989 and continued on March 15, 16, 20, 21, 22, 23, and 24. Stevens was represented by counsel throughout the proceedings and he testified by telephone.

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[4] The court's order is reprinted as Appendix D of Stevens' Petition for Writ of Certiorari.

## REASONS FOR DENYING CERTIORARI

Stevens' due process claim has two parts. He argues first that Oregon's refusal to provide funds to bring him from the penitentiary in Walla Walla, Washington to the trial in Eugene, Oregon deprived him of his right to be seen by the trial court. He also argues that the state's refusal prevented him from effectively consulting with his trial counsel. (*See* Pet. Cert. 5, 7). The short answer to Stevens' second argument (the claimed inability to consult with his trial counsel) is that the Oregon Court of Appeals rejected the factual premise for that claim. It found that Stevens was not hampered or limited in his ability to consult with his counsel or to participate at trial. *See State ex rel. Juv. Dept. v. Stevens*, 100 Or. App. 481, 487, 786 P.2d 1296, *rev. denied*, 310 Or. 71 (1990). That factual finding is dispositive. *See Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913).

The short answer to Stevens' first argument (the claimed right to be seen by the factfinder) is that it is moot. Stevens' argument fails to recognize that the trial court is not the only factfinder in Oregon termination cases. Under Oregon law, the Oregon Court of Appeals makes an independent factual and legal determination whether a parent's rights should be terminated. *See State ex rel. Juv. Dept. v. Stevens, supra.* The court of appeals hears no live testimony; it bases its decision instead on the cold record created in the trial court. Thus, Stevens was on equal footing with all of the other witnesses before the appellate court, whether or not he had testified by telephone at trial.

Stevens did not argue below, and does not contend here, that his inability to be seen by the Oregon Court of Appeals violated due process. Absent some claim that the appellate court's review was itself constitutionally inadequate, that

court's *de novo* decision provides an independent basis for the judgments terminating Stevens' parental rights. Accordingly, whether the trial court proceeding was constitutionally inadequate is immaterial, at least for the purposes of the validity of the state court judgment. *See Michigan v. Long*, 463 U.S. 1032 (1983) (no jurisdiction where state judgment clearly rests on independent and adequate state ground); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (no jurisdiction over state judgment that may rest on independent and adequate state ground).

Stevens perhaps could question whether the appellate decision was truly independent, and in many cases his question would be appropriate. In reviewing termination cases, the Oregon Court of Appeals customarily gives "due regard to the findings of the trial court," because of the trial court's "opportunity to observe the witnesses." *E.g.*, *State ex rel. Juv. Dept. v. Pennington*, 104 Or. App. 194, 196, 799 P.2d 694 (1990). The problems for Stevens in this case, however, are (1) that the Oregon Court of Appeals found that he had admitted many of the bad acts that Virginia Stevens said he had committed and (2) that even after expressly accepting Stevens' version of events where it conflicted with the mother's, the reviewing court remained convinced, as the factfinder, that Stevens' parental rights should be terminated. *See State ex rel. Juv. Dept. v. Stevens*, *supra* 100 Or. App. at 488.[5]

Because the Oregon Court of Appeals' *de novo* decision provides an independent basis for the state judgment termi-

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[5] In his brief in the Oregon Court of Appeals, Stevens had argued:

> By denying [Stevens] his right to be present during the trial, the [trial] court denied him his rights to personally confront the witnesses against him and to testify in person so that his demeanor and credibility could be properly evaluated. *Since virtually the only witness against [him] was [the] mother, it was critical to the [trial] court's ability to weigh his credibility against hers that the father be able to testify in person.*

(Brief at 25-26; emphasis added).

nating Stevens' parental rights, the Court need not reach the merits of his claimed right to be seen. In any event, as discussed in detail below, Stevens' due process claim lacks merit and is not supported by the record.

**I. Stevens must show that his absence impermissibly increased the risk of an erroneous result.**

It is beyond dispute that when the state acts to terminate the relationship between a parent and his child, it must do so through procedures that meet the requirements of the Due Process Clause; *i.e.*, "it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982). "[U]nlike some legal rules," however, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). What process is "fundamentally fair" in a state termination-of-parental-rights proceeding is determined by applying the standards set out in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *See Santosky v. Kramer*, *supra*, 455 U.S. at 754-68 (due process requires proof by clear and convincing evidence in termination proceedings); *Lassiter v. Department of Social Services*, 452 U.S. 18, 27-31 (1981) (due process does not require appointment of counsel for indigent parents in every termination proceeding; "the decision whether due process calls for the appointment of counsel for indigent parents" in a given case is "to be answered in the first instance by the trial court, subject . . . to appellate review"). The *Mathews* test requires a weighing or balancing of three factors: (1) the private interests "affected by the official action"; (2) the state's interest in using the challenged procedure; (3) the risk that the procedure used will lead to erroneous decisions, "and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, *supra*. *See Santosky v. Kramer*, *supra* 455 U.S. at 754; *Lassiter v. Department of Social*

*Services*, *supra* 452 U.S. at 27. The question presented in this case turns on third of the *Mathews* criteria.

Stevens' interest "in the accuracy and justice of the decision to terminate" his parental rights "is a commanding one." *See Santosky v. Kramer*, *supra* 455 U.S. at 758; *Lassiter v. Department of Social Services*, 452 U.S. at 27. Because the state "has an urgent interest in the welfare of the child[ren]" involved, "it shares the parent's interest in an accurate and just decision." *Lassiter v. Department of Social Services*, *supra*. The state's interests and Stevens' interests diverge, however, with respect to Stevens' request for funds to pay the estimated transportation and security costs associated with his appearing at trial. The state acknowledges that its pecuniary interest, though legitimate, does not outweigh Stevens' interest in retaining his parental rights. *See Lassiter v. Department of Social Services*, *supra* 452 U.S. at 27-28. The state does not concede, however, that its only interest is financial. Stevens did not request approval for payment of the expenses in question until three weeks before the stipulated trial date, even though the final date had been scheduled for five months. At the time of the request, his trial counsel had not yet filed a petition for a writ of habeas corpus *ad testificandum* to secure Stevens' release from incarceration in Washington; instead, she planned to do so "immediately" if the request for payment of the expenses were allowed. Stevens made no showing that the writ would have been granted before the date of trial, if at all. *See generally* 28 U.S.C. § 2241(c)(5); *Ballard v. Spradley*, 557 F.2d 476, 479-81 (5th Cir. 1977). That lack of certainty implicates the state's obvious strong interest in determining the children's status without undue delay.

The final and dispositive consideration is the degree of risk, if any, that Stevens' parental rights were terminated erroneously because he was not present at trial. *See Lassiter v. Department of Social Services*, *supra* 452 U.S. at

28-32. Oregon law seeks to ensure accurate decisions in termination cases through a number of procedural safeguards. The grounds for termination of parental rights are defined primarily by statute. *See* Or. Rev. Stat. § 419.523. Trial courts are required to appoint an attorney to represent indigent parents who request such assistance. Or. Rev. Stat. § 419.525(2). The hearing on the termination petition is held before a trial court, without a jury, and the facts alleged in support of the petition, "unless admitted, must be established by clear and convincing evidence." Or. Rev. Stat. § 419.525(3). Parents have a right to appeal to the Oregon Court of Appeals from a judgment terminating their rights. Or. Rev. Stat. § 419.561. *See* Or. Rev. Stat. § 419.525(4). The Oregon Court of Appeals reviews *de novo* questions of both fact and law. *See* Or. Rev. Stat. §§ 419.561(4) and 19.125(3); *State ex rel. Juv. Dept. v. Stevens*, *supra* 100 Or. App. at 487. The appellate court will reverse a trial court's termination decision if its independent review of the factual record leads it to conclude that the state failed to prove its case. *See, e.g., State ex rel. Juv. Dept. v. Pennington*, *supra* 104 Or. App. at 201 ("[t]he evidence fails to convince us under [the applicable standard of proof] . . . that integration [of the children] into [the mother's] home is improbable in the foreseeable future," which is a required element under Or. Rev. Stat. § 419.523). Parents may challenge the adequacy of appointed counsel on direct appeal from a judgment terminating their parental rights. *See State ex rel. Juv. Dept. v. Geist*, 310 Or. 176, 187, 796 P.2d 1193 (1990).

The procedural safeguards in a proceeding to terminate parental rights are substantial. Stevens' due process challenge requires him to demonstrate that his absence and the initial factfinder's inability to observe him while he testified impaired the integrity of the factfinder's decision. Put differently, Stevens must show to what degree, if any, his absence

from the termination proceedings increased the risk of an erroneous decision or that his presence would have reduced such a risk. For the reasons outlined below, he has failed to carry that burden.

**II. Stevens had a meaningful opportunity to be heard and was effectively represented by trial counsel.**

Stevens points to nothing in the record to support his claim that, because of his absence, "he could not effectively consult with or assist his attorney in meeting the government's evidence." (Pet. Cert. at 7). He also ignores the findings of fact by the court of appeals that contradict his claim:

> Stevens testified by telephone and was able to consult with his counsel in the same way. His testimony followed that of the adverse witnesses and responded to it point by point, and his counsel was able to cross-examine the adverse witnesses meaningfully. Those facts suggest that he was able *effectively* to consult with counsel. Indeed, he does not claim that any specific portion of the trial was affected by his absence or that his inability to consult with counsel in person hampered any specific portion of trial preparation or strategy.

*State ex rel. Juv. Dept. v. Stevens*, *supra* 100 Or. App. at 487 (emphasis in original; footnote omitted).[6]

The record fully supports the appellate court's findings and establishes that, notwithstanding his participation by telephone, Stevens had a full, fair, and meaningful oppor-

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[6] Stevens' suggestion that "the absence of broad civil-type discovery in parental termination hearings" affected the presentation of his case, (Pet. Cert. at 12, n. 6), is a new argument which is both beside the point and without merit. He made no claim in the Oregon Court of Appeals that the state provided less than full discovery, and Or. Rev. Stat. § 419.567 authorizes attorneys for parents to have complete access to the juvenile court's legal and social files concerning children within the court's jurisdiction. Stevens' right-of-confrontation discussion likewise is largely irrelevant. (*See* Pet. Cert. at 9). The Sixth Amendment right of confrontation applies only to criminal cases; there is no similar right in a civil trial.

tunity to challenge the state's evidence and to present his own evidence. He was vigorously represented by competent counsel who was present throughout the proceedings. He does not explain in what respects the evidence that he presented or his counsel's cross-examination of the state's witnesses against him would have been any different had he been present. *See* Tr. March 20, 1989, at 2-33 (cross-examination of caseworker by Stevens' trial counsel); Tr. March 21, 1989, at 8-32 (further cross-examination of caseworker); Tr. March 23, 1989, at 301-14 (cross-examination of Virginia Stevens by trial counsel); Tr. March 23, 1989, at 414-49 and Tr. March 24, 1989, at 473-520 (Stevens' telephone testimony). He does not claim that either he or his attorney requested a recess or continuance to consult during trial or that, had either of them made such a request, it would have been denied. Stevens testified by telephone after the state's witnesses against him had testified, and, through counsel, he introduced numerous exhibits. (*See* Tr. March 23, 1989, at 414-49; Tr. March 24, 1989, at 473-520; Exs. 101-12, 118, 119, 122, 123). At the close of the state's case, his trial counsel successfully moved to strike two of the material allegations of the termination petition against him and part of another for lack of proof, citing, *inter alia*, exhibits that counsel had introduced. (*See* Tr. March 23, 1989, at 379-85; Judgments Terminating Parental Rights and Orders of Permanent Commitment). Stevens makes no claim that his trial counsel was inadequate.

On this record, Stevens has failed to show that his having to participate by telephone caused any prejudice to his counsel's presentation of his case.

**III. Stevens has not shown that the trial court's inability to observe Stevens' demeanor affected the result in this case.**

Stevens' claim that he was denied due process because the trial court was unable to observe his demeanor is equally with-

out merit. Notwithstanding the obvious significance of a fact-finder's assessment of a witness's credibility, neither in this case, nor in Oregon termination proceedings generally, does the trial court's decision whether to terminate turn on the type of "subjective" or "moral" considerations suggested by Stevens.[7] *See* Or. Rev. Stat. §§ 419.523 and 419.525. (*See also* Judgments Terminating Parental Rights and Orders of Permanent Commitment). Moreover, a trial court may assess the credibility (and character) of a person by means other than observing his demeanor. Stevens does not explain why the trial court could not have made an accurate assessment of his credibility on the basis of his telephone testimony, including his explanation of and responses to the allegations in the termination petitions.

Finally, as discussed *supra* at 3-4, Stevens' argument in support of his claimed due process right to have his demeanor assessed ignores the nature of the Oregon Court of Appeals' review. That court reviewed the record in this case *de novo* and found that the state had established by clear and convincing evidence, that his parental rights should be terminated. The court stated, in pertinent part, as follows:

> [The dissent] assumes, as a matter of fact, that the trial court's inability to evaluate Stevens' demeanor in person was important here, because "[a] key witness adverse to father was the child's mother, who did appear in person." 100 Or App 489. Testimony from witnesses, other than mother, during the lengthy trial bore on Stevens' fitness. Most significantly, Stevens

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[7] *See* Pet. Cert. at 10-11 ("The ability of a trier of fact to judge the moral 'worth' of a person and to predict his or her future conduct demands an intuitive evaluation that cannot adequately be based on mere words."). In addition, the record shows that Stevens had no difficulty testifying fully by speaker phone, although he claims in his brief that such devices were "alien" to him. *See* Pet. Cert. at 10-11 n. 4.

> admitted many of the key facts about which mother testified, including his participation in the manufacture of methamphetamines, his past abuse of drugs and alcohol, and his long criminal history; most recently he had pled guilty to a federal charge of manufacturing marijuana. He admitted that the people with whom he was associating before his incarceration were dangerous to him and his family. Moreover, the trial court clearly viewed mother's testimony with caution, as shown by its termination of her parental rights. *Even if we, on* de novo *review, accepted Stevens' version where it conflicted with mother's, we would still affirm the trial court's decision.* On this record, it is not likely that his absence was in fact critical.

*State ex rel. Juv. Dept. v. Stevens*, *supra* 100 Or. App. at 488 (emphasis added).

Stevens, in effect, was given a second trial before a new trier of fact. The second trial was *de novo* on the record; *i.e.*, the Oregon Court of Appeals did not observe the demeanor of *any* witness. That court, like the trial court, concluded that the state had proved its case. As the portion of the court of appeals' opinion quoted above demonstrates, the trial court's inability to observe Stevens' demeanor did not affect the ultimate result in this termination proceeding.

**IV. Summary**

Stevens asserts that the right he claims is a "qualified" one. (*See* Pet. Cert. at 5, 14). Essentially, he concedes that whether due process requires that a parent be present at a termination proceeding, like the right-to-counsel question presented in *Lassiter*, depends upon the circumstances of the particular case. *Compare Santosky v. Kramer*, *supra* 455 U.S. at 757-58. Stevens has failed, however, to demonstrate either that his absence impermissibly increased the risk of erroneous deprivation of his parental rights or that his physical presence in the courtroom would have aided him in the presentation of his case. On this record, consequently, his argument *in sub-*

*stance*, is that the claimed right is absolute; *i.e.*, that in all cases due process requires that indigent parents be provided the cost of attending termination trials. That is a different argument from the one that he purports to make, and no authority supports it.

Stevens' petition, in the final analysis, raises no significant due process questions. Consistent with this Court's analysis in *Lassiter*, the Oregon Court of Appeals considered Stevens' claimed right to be present in the context of the facts and circumstances of the proceedings in question (including the availability of other methods of presenting his case) and found that his participation by telephone did not affect the fairness or result of the proceedings. The Oregon court's resolution is consistent with other appellate courts' decisions in similar cases.[8]

## CONCLUSION

For the foregoing reasons, Stevens' Petition for a Writ of Certiorari should be denied.

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[8] *See In re Randy Scott B.*, 511 A.2d 450 (Me. 1986); *In re Juvenile Appeal*, 187 Conn. 431, 446 A.2d 808 (1982); *In the Interest of F.H.*, 283 N.W.2d 202 (N.D. 1979).

# APPENDIX A

## OREGON REVISED STATUTES

## 419.523

**419.523 Termination of parental rights; grounds.** (1) The parental rights of the parents of a child within the jurisdiction of the juvenile court as provided in ORS 419.476(1) may be terminated as provided in this section and ORS 419.525. The rights of one parent may be terminated without affecting the rights of the other parent.

(2) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home of the parent or parents is improbable in the foreseeable future due to conduct or conditions not likely to change. In determining such conduct and conditions, the court shall consider but is not limited to the following:

(a) Emotional illness, mental illness or mental deficiency of the parent of such duration as to render it impossible to care for the child for extended periods of time.

(b) Conduct toward any child of an abusive, cruel or sexual nature.

(c) Addictive use of intoxicating liquors or controlled substances.

(d) Physical neglect of the child.

(e) Lack of effort of the parent to adjust the circumstances of the parent, conduct, or conditions to make the return of the child possible or failure of the parent to effect a lasting adjustment after reasonable efforts by available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected.

(e) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds

that the parent or parents have failed or neglected without reasonable and lawful cause to provide for the basic physical and psychological needs of the child for one year prior to the filing of a petition. In determining such failure or neglect, the court shall consider but is not limited to one or more of the following:

(a) Failure to provide care or pay a reasonable portion of substitute physical care and maintenance if custody is lodged with others.

(b) Failure to maintain regular visitation or other contact with the child which was designed and implemented to a plan to reunite the child with the parent.

(c) Failure to contact or communicate with the child or with the custodian of the child. In making this determination, the court may disregard incidental visitations, communications or contributions.

(4) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents have abandoned this child or the child was left under circumstances such that the identity of the parent or parents of the child was unknown and could not be ascertained, despite diligent searching, and the parent or parents have not come forward to claim the child within six months following the finding of the child.

Supreme Court, U.S.
FILED
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No. 90-703

In The

# Supreme Court of the United States

October Term, 1990

MARTIN MITCHELL STEVENS,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

**Petition For Writ Of Certiorari**
**To Court Of Appeals Of The State Of Oregon**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Embedded within the State's opposition is recognition that petitioner's constitutional concern is substantial. *See, e.g.*, Respondent's Brief in Opposition ("Opp.") at 6 ("Stevens' interest 'in the accuracy and justice of the decision to terminate' his parental rights 'is a commanding one'.") ("The state acknowledges that its pecuniary interest, though legitimate, does not outweigh Stevens' interest in retaining his parental rights"). It argues, however, that review should be denied because Stevens, in fact, suffered no prejudice from any denial of his "right to be seen" (*See* Petition for Writ of Certiorari ("Petition") at 5) – in effect, that the denial constituted "harmless error."[1]

That argument furnishes no ground for refusing Stevens' request for review. While there can be harmless

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[1] The State argues, additionally, that Stevens' petition should be denied in light of the purported *de novo* review of parental termination orders by Oregon appellate courts. *See* Opp. at 3-4. That review, says the state, represents an "independent [state] ground" of decision, making "immaterial" the determination of "whether the trial court proceeding was constitutionally inadequate." Opp. at 4. The argument lacks merit on its face. The State concedes that "[i]n reviewing termination cases, the Oregon Court of Appeals customarily gives due regard to the findings of the trial court. . . . " (Opp. at 4). In fact, as if to underscore why this petition should be *granted*, the State notes that the reason for such deference is precisely "because of the trial court's 'opportunity to observe the witnesses'." *Id.* That, of course, is petitioner's point. *See* Petition, *passim*. Moreover, the argument that *de novo* review constitutes an independent state ground utterly misconceives that doctrine. While state laws may *expand* rights guaranteed by the United States Constitution, they, obviously, cannot obviate the violation of a right guaranteed by the federal Constitution.

constitutional error in some circumstances (*see Chapman v. California*, 386 U.S. 18 (1967)), that principle has no application here. The right which petitioner asserts is the right to have his suitability as a parent judged by an assessment of his fitness that can be made only through personal observation of him at a hearing. *See* Petition at 10-11. Since the trial court did not have that opportunity, it is impossible to assess *post hoc* what impact his appearance might have had. Stated otherwise, the nature of the right asserted by petitioner is inherently incompatible with a determination that its denial worked no prejudice.

In addition, petitioner's right to be present at the hearing in order to consult with and assist his counsel is equally inconsistent with a harmless error claim. As *Chapman*, itself, acknowledged, certain constitutional deprivations "can never be treated as harmless error." 386 U.S. at 23. Among them is the right to assistance of counsel. *Id.*, footnote 8. Moreover, that principle applies not simply to the right to have counsel, as such, but to the effective assistance of such counsel (*United States v. Cronic*, 466 U.S. 648, 653-57 (1984)), including, specifically, the ability to consult throughout the proceedings. *See, e.g., Geders v. United States*, 425 U.S. 80 (1976); *Perry v. Leeke*, 488 U.S. 272 (1989).[2]

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[2] Petitioner, of course, recognizes that parental termination proceedings are not criminal. However this Court has observed that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). *See* Petition at pp. 6-7. Thus, it would seem that analogous principles of constitutional harmless error should apply.

Under *Geders* and *Perry*, the right to effective assistance of counsel requires a client to have the ability to work with his or her attorney without impairment throughout the trial. The only limitation on that right which this Court has recognized is during a brief recess *while the defendant is actually on the stand. Perry, supra.* That isolated limitation – which is premised on concerns about the effect of consultation on the defendant's testimony – stands in sharp contrast with the procedures approved by the State of Oregon here, which relegated Stevens to occasional after-hours phone conversations with his attorney.

Moreover, the error resulting from Stevens' absence is not of a type that can be determined to be harmless. Whether his absence had an impact upon the outcome of the hearing is not a matter that can be realistically assessed by a reviewing court. Unlike other types of errors which are, in effect, transparent from the record, the impact of Stevens' inability to consult contemporaneously with his counsel cannot meaningfully be evaluated – certainly not in a way that would permit a court to satisfy the *Chapman* standard of determining "beyond a reasonable doubt" that the deprivation resulted in no prejudice. *See* 386 U.S. at 24.[3]

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[3] In all events, the question of whether deprivation of the right to attend the proceedings and to testify in person can be harmless error is, itself, worthy of this Court's consideration.

## CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, the petition should be granted.

Dated: February 11, 1991.

Respectfully submitted,

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